CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 635 27

JOSEPH H. BROMLEY

vs.

BLAKELY D. McCAUGHN, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

FILED JANUARY 19, 1929

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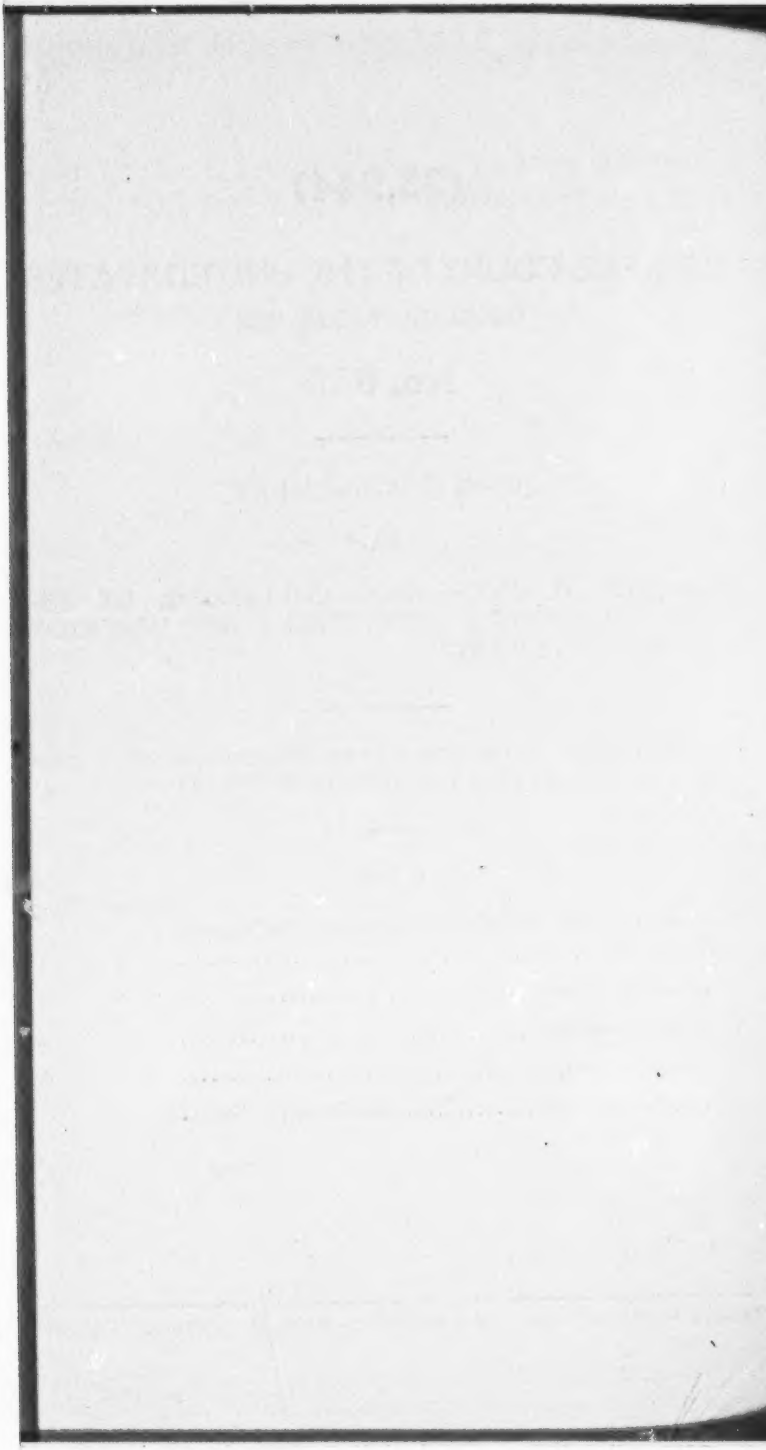

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1928

No. 3927

JOSEPH H. BROMLEY, Plaintiff Below, Appellant,

vs.

BLAKELY D. MCCAUGHN, Collector of Internal Revenue for the First District of Pennsylvania, Defendant Below, Appellee

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Before Buffington and Woolley, Circuit Judges, and McVicar, District Judge

Certificate to Supreme Court

STATEMENT OF FACTS

The Circuit Court of Appeals for the Third Circuit, desiring that the Supreme Court should guide it to a proper decision of this case, certifies (under authority of Section 239 of the Judicial Code) two questions of law of general importance which arise from the following facts:

In March, 1926, Joseph H. Bromley, then and theretofore a resident of the United States, filed with Blakeley D. McCaughn, Collector of Internal Revenue for the First District of Pensylvania, a return of his income for tax purposes which disclosed gifts he had made during the calendar year 1925 amounting to a net total of $568,300, on which, under protest, he paid a tax of $20,598 assessed pursuant to the provisions of the Revenue Act of 1924 as amended by the [fol. 2] Revenue Act of 1926. After the Commissioner of Internal Revenue had denied his claim for refund of the tax so paid, Bromley brought this action in the District Court of the United tSates for the Eastern District of Pennsylvania against the Collector for the amount of the gift tax and interest.

Specifically, the action is one to recover a tax upon transfers by gift, levied and collected under the provisions of Sections 319-324, inclusive, of the Revenue Act of 1924, approved June 2, 1924 (43 Stat. 253, 313), as amended by Section 324 of the Revenue Act of 1926, approved February 26, 1926 (44 Stat. 9, 86). The pertinent provisions, as amended, read as follows:

"(a) Section 319. For the calendar year 1924 and the calendar year 1925, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, * * *

(b) Sub-division (a) of this section shall take effect as of June 2, 1924."

The cause was presented to the trial court in the nature of a case stated, showing that the transfers by gift were all inter vivos, fully consummated after the enactment of the Revenue Act first cited and not made in contemplation of death, and containing a stipulation that judgment should be entered for the plaintiff or defendant according as the applicable provisions of the taxing act should be found invalid or valid.

The learned district court, being influenced in its judgment by decisions of the Supreme Court, particularly by those in Hylton vs. United States, 3 U. S. 171; Pollock vs. Farmers' Loan and Trust Company, 157 U. S. 429, 158 U. S. 601; Blodgett vs. Holden, 275 U. S. 142 and Untermyer vs. Anderson, 276 U. S. 440, as they bear directly or indirectly on the issues involved, held that the provisions of the Revenue Act under which the gift tax here in question was assessed and collected are not unconstitutional and accordingly entered judgment for the defendant. The plaintiff appealed.

Questions Certified

The questions of law growing out of the aforegoing facts upon which the Circuit Court of Appeals desires the instruction of the Supreme Court art these:

[fol. 3] 1. Are the provisions of Sections 319-324 of the Revenue Act of 1924, as amended by Section 324 of the Revenue Act of 1926, when applied to transfers of property by gift inter vivos, made after the effective dates of the cited

Revenue Acts and not made in contemplation of death, invalid, because they violate (a) the third clause of Section 2 and (b) the fourth clause of Section 9 of Article 1 of the Constitution in that the tax they impose is a direct tax and has not been apportioned?

2. Are the cited provisions, when applied to transfers of property made in like circumstances, invalid because they violate (a) the Fifth Amendment to the Constitution and (b) the first clause of Section 8 of Article 1 of the Constitution in that they impose a tax which is graduated and subject to exemptions and therefore lacks uniformity, and also deprive a person of his property without due process of law?

Joseph Buffington, Circuit Judge. Victor B. Woolley, Circuit Judge. Nelson McVicar, District Judge.

Dated January 2, 1929.

[fol. 4] Clerk's certificate to foregoing transcript omitted in printing.

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IN THE

Supreme Court of the United States

No. ~~835~~. 27 October Term, 1928.

JOSEPH H. BROMLEY,
Appellant,
(Plaintiff Below),

v.

BLAKELY D. McCAUGHN, Collector of Internal Revenue for the First District of Pennsylvania,
Appellee,
(Defendant Below).

On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR APPELLANT.

IRA JEWELL WILLIAMS, JR.,
IRA JEWELL WILLIAMS,
FRANCIS SHUNK BROWN,
Attorneys for Appellant.

International, 236 Chestnut St., Philadelphia

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IN THE

Supreme Court of the United States.

No. 635. October Term, 1928.

JOSEPH H. BROMLEY,
Appellant,
(Plaintiff Below),

v.

BLAKELY D. McCAUGHN, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA,
Appellee,
(Defendant Below).

On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR APPELLANT.

I.

OPINIONS BELOW.

The opinion in the District Court is reported in 26 Fed. 2d, 380 (1928).

There was no opinion in the Circuit Court of Appeals.

II.

JURISDICTION.

1. This court has jurisdiction to answer questions certified by the Circuit Court of Appeals under United States Code, Title 28, Sec. 346.

2. The date of the judgment of the District Court is May 23, 1928. The Circuit Court of Appeals certified to this Court the questions set out, *infra*, p. 3.

III.

STATEMENT OF THE CASE.

In March, 1926, Joseph H. Bromley, appellant, then and theretofore a resident of the United States, filed with the Collector of Internal Revenue for the First District of Pennsylvania, a return of his income for tax purposes, disclosing gifts made during the calendar year 1925 amounting to $568,300, on which, under protest, he paid a tax of $20,598, assessed pursuant to the provisions of the Revenue Act of 1924. After the Commissioner of Internal Revenue had denied his claim for refund of the tax so paid, Bromley brought this action in the District Court of the United States for the Eastern District of Pennsylvania against the Collector, for the amount of the tax paid and interest.

The action is one to recover a tax upon transfers by gift, levied and collected under the provisions of Sections 319-324, inclusive, of the Revenue Act of 1924, approved June 2, 1924 (43 Stat. 253, 313), as amended by Section 324 of the Revenue Act of 1926 approved February 26, 1926 (44 Stat. 9, 86). The pertinent provisions, as amended, read as follows:

> "(a) Section 319. For the calendar year 1924 and the calendar year 1925, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, . . .
>
> "(b) Sub-division (a) of this section shall take effect as of June 2, 1924."

The cause was heard by the District Court sur statutory demurrer in the nature of a case stated, showing that the transfers by gift were all inter vivos; were made after

the enactment of the Revenue Act first cited; and were not made in contemplation of death. The parties stipulated that judgment should be entered for the plaintiff or defendant according as the applicable provisions of the taxing act should be found invalid or valid.

The learned District Court held that the provisions of the Revenue Act under which the tax was collected were not unconstitutional, and entered judgment for the defendant. The plaintiff appealed to the Circuit Court of Appeals for the Third Circuit. That Court has certified to this Court two questions as follows:

1. Are the provisions of Sections 319-324 of the Revenue Act of 1924, as amended by Section 324 of the Revenue Act of 1926, when applied to transfers of property by gift inter vivos, made after the effective dates of the cited Revenue Acts and not made in contemplation of death, invalid, because they violate (a) the third clause of Section 2 and (b) the fourth clause of Section 9 of Article I of the Constitution of the United States in that the tax they impose is a direct tax and has not been apportioned?

2. Are the cited provisions, when applied to transfers of property made in like circumstances, invalid because they violate (a) the Fifth Amendment of the Constitution and (b) the first clause of Section 8 of Article I of the Constitution in that they impose a tax which is graduated and subject to exemption and, therefore, lacks uniformity, and also deprive a person of his property without due process of law?

IV.

THE ACTS AND THE CONSTITUTIONAL PROVISIONS.

1. The Act is as follows:

Revenue Act of 1924, Section 319, 43 Stat. 313:

"For the calendar year 1924 and each calendar year thereafter a tax equal to the sum of the following is hereby

imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a nonresident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly:

1 per centum of the amount of the taxable gifts not in excess of $50,000.;

2 per centum of the amount by which the taxable gifts exceed $50,000. and do not exceed $100,000.;

3 per centum of the amount by which the taxable gifts exceed $100,000. and do not exceed $150,000.;

4 per centum of the amount by which the taxable gifts exceed $150,000. and do not exceed $250,000.;

6 per centum of the amount by which the taxable gifts exceed $250,000. and do not exceed $450,000.;

9 per centum of the amount by which the taxable gifts exceed $450,000. and do not exceed $750,000.;

12 per centum of the amount by which the taxable gifts exceed $750,000. and do not exceed $1,000,000.;

15 per centum of the amount by which the taxable gifts exceed $1,000,000. and do not exceed $1,500,000.;

18 per centum of the amount by which the taxable gifts exceed $1,500,000. and do not exceed $2,000,000.;

21 per centum of the amount by which the taxable gifts exceed $2,000,000. and do not exceed $3,000,000.;

24 per centum of the amount by which the taxable gifts exceed $3,000,000. and do not exceed $4,000,000.;

27 per centum of the amount by which the taxable gifts exceed $4,000,000. and do not exceed $5,000,000.;

30 per centum of the amount by which the taxable gifts exceed $5,000,000. and do not exceed $8,000,000.;

35 per centum of the amount by which the taxable gifts exceed $8,000,000. and do not exceed $10,000,000.;

40 per centum of the amount by which the taxable gifts exceed $10,000,000."

Section 321:

"In computing the amount of the gifts subject to the tax imposed by section 319, there shall be allowed as deductions:

(a) In the case of a resident—

(1) An exemption of $50,000.;

(2) The amount of all gifts or contributions made within the calendar year to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees, or fraternal society, order, or association, operating under the lodge system, but only if such gifts or contributions are to be used by such trustee or trustees or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year by such corporation, trustee, or fraternal society, order, or association for a religious, charitable, scientific, literary, or educational purpose or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year to the special fund for vocational rehabilitation authorized by section 7 of the vocational rehabilitation Act;

(3) Gifts the aggregate amount of which to any one person does not exceed $500.;

(4) An amount equal to the value of any property transferred by gift within the calendar year, which can be identified (a) as having been received by the donor within five years prior to the time of his making such gift, either from another person by gift or from a decedent by gift, bequest, devise, or inheritance, or (b) as having been acquired in exchange for property so received. This deduction shall be allowed only where a gift tax or an estate tax under this or any prior Act of Congress was paid by or on behalf of the donor or the estate of such decedent, as the case may be, and only in the amount of the value placed by the Commissioner on such property in determining the value of the gift or the gross estate of such decedent, and only to the extent that the value of such property is included in the total amount of gifts made within the calendar year and not deducted under paragraph (2) or (3) of this subdivision.

(b) In the case of a nonresident—

(1) The amount of all gifts or contributions made within the calendar year to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any domestic corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees, or fraternal society, order or association, operating under the lodge system, but only if such gifts or contributions are to be used within the United States by such trustee or trustees or by such fraternal society, order, or association, exclusively for religious charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, and the amount

of all gifts or contributions made within the calendar year by such corporation, trustee, or fraternal society, order, or association for a religious, charitable, scientific, literary, or educational purpose, or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year to the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act;

(2) Gifts the aggregate amount of which to any one person does not exceed $500.;

* * * * * * *"

Section 323. "Any person who within the year 1924 or any calendar year thereafter makes any gift or gifts in excess of the deductions allowed by section 321 shall, on or before the 15th day of March, file with the Collector a return under oath in duplicate, listing and setting forth therein all gifts and contributions made by him during such calendar year (other than the gifts specified in paragraph (3) of subdivisions (a) and in paragraph (2) of subdivision (b) of section 321), and the fair market value thereof when made, and also all sales and exchanges of property owned by him made within such year for less than a fair consideration in money or money's worth, stating therein the fair market value of the property so sold or exchanged and that of the consideration received by him, both as of the date of such sale or exchange."

Section 324. "The tax imposed by section 319 shall be paid by the donor on or before the 15th day of March, and shall be assessed, collected and paid in the same manner and subject, in so far as applicable, to the same provisions of law as the tax imposed by section 301."

Section 319 of the Revenue Act of 1924, 43 Stat. 313, was amended by the Revenue Act of 1926, 44 Stat. 86, so as to reduce the rate of taxation in the higher brackets, the highest tax being 25 per centum on taxable gifts in excess of $10,000,000, instead of 40 per centum in such bracket.

2. The Constitutional Provisions.

The Constitution, Article I, Sec. 2, Cl. 3, provides:

"Representatives and direct taxes shall be apportioned among the several States . . . according to their respective numbers."

Clause 4 of Sec. 9 of Article I is as follows:

"No capitation, or other direct tax, shall be laid, unless in proportion to the Census or enumeration hereinbefore directed to be taken."

Clause 1 of Section VIII, Article I, provides:

"The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

Amendment V provides:

"No person . . . shall be deprived of life, liberty, or property, without due process of law."

V.

SUMMARY OF ARGUMENT.

A. The Gift Tax is a Direct Tax and hence void because unapportioned.

1. If direct, the Gift Tax is void because unapportioned.

2. Indirect taxes are of three kinds only. The Gift Tax falls into none of these categories and is therefore direct.

3. The Tax is a tax upon an essential incident of property and is therefore direct.

B. The Gift Tax is not a uniform tax and is therefore void.

VI.

ARGUMENT.

Preliminary Statement.

The Act in question was approved by President Coolidge with reluctance. He said:

> "A Gift Tax is a further invasion of the rights of the citizen both unusual in nature and of doubtful legality."

The tax has since been repealed (Revenue Act of February 26th, 1926). The Act is not retroactive:

> Blodgett v. Holden 273 U. S. 142 (1926);
> Untermyer v. Anderson 276 U. S. 440 (1927).

The tax is unique in this country and rare elsewhere. In Mexico, for example, the rate is a uniform 10 per cent. But here the tax is graduated, the rates being the same as the then current inheritance tax rates, i. e., 1 per cent. on $50,000, up to 40 per cent. on amounts of $10,000,000 and upwards. Gifts of less than $500 each to one person are not taxed. There are certain discriminations between residents and non-residents.

There are attributes of property so fundamental and so inseparably a part of property that a tax on these property rights is a tax on property itself; otherwise the mandate against direct taxes would be illusory.

A tax upon the income of property is a tax upon property. Income Tax Cases 158 U. S., 630 (1895); Pollock v. Farmers' L. & T. Co., 157 U. S., 570 (1895); 158 U. S., 601 (1895).

This is because, when property does produce income, the product in substance and common sense so partakes of the nature of the producing property that a tax on the income is a tax on the property producing the income. In the *Income Tax Cases* this Court were unanimously of the opinion that the tax upon the interest of municipal bonds

was a tax upon the bond and, therefore, invalid: 158 U. S., 630 (1895). The dissenting Justices held that neither rents of real estate nor income of personal property were direct taxes. The majority held that taxes upon rents of real estate were taxes upon the real estate, and taxes upon the income of personal property were taxes upon the personal property, and hence direct. The taxes were direct taxes because they were taxes upon property.

A fortiori, a tax upon a gift is a tax upon property. Property may exist without income, *but one does not own property unless one can give it away.* The final test of absolute ownership, the supreme exercise of the power of dominion over property, is the gratuitous disposition of property. Here a father was taxed because he chose to give $150,000 each to his four sons, not, however, in contemplation of death. If he had kept his property any tax on the income therefrom would have been a direct tax.

I. The Gift Tax Is a Direct Tax, and Hence Void Because Unapportioned.

1. *If the Gift Tax is direct, it is void.*

The Constitution twice provides that direct taxes must be apportioned:

Art. I, Sec. 2, Cl. 3.
Art. I, Sec. 9, Cl. 4.

The latter clause provides:

> "No capitation, or other direct tax shall be laid, unless in proportion to the Census or Enumeration hereinbefore directed to be taken."

It should be noted that the words "or ~~any~~ other direct" (in Art. I, Sec. 9, Cl. 4, supra) did not appear in the first draft of the Constitution, but were inserted so as to make it clear that Congress had no power to lay direct taxes without apportionment: *Constitution of the United States of America,*

Annotated, page 255 (a Senate Document printed in consequence of Senate Resolution No. 151, dated December 7, 1921).

But a tax upon income is a direct tax (*Pollock* v. *Farmers' Loan & Trust Co., supra*) permitted only because the Sixteenth Amendment removed the prohibition against the levying of that particular tax:

Eisner v. Macomber, 252 U. S., 189, 219 (1921).

That the Gift Tax is not an Income Tax (it is payable by the donor), and is not apportioned is so obvious as not to require argument.

It is, therefore, unconstitutional unless it be indirect.

2. *Making a gift is a right, not a privilege.*

Whether one regards "property" as the sum of the legal rights of the owner in respect to the object; or whether one regards the rights incident to ownership of property as necessarily flowing from the nature of the legal concept of "property" — in either case the faculty of making a gift is one of the rights of the owner of property.

Blackstone says (1 Wend. Blackstone's Commentaries, Chap. 1, p. 138):

> "The third absolute right inherent in every Englishman is that of *property,* which consists in the *free use, enjoyment and disposal of all his acquisitions,* without any control or diminution, save only by the laws of the land . . . " (Italics ours.)

It was said in

Todd v. Wick Bros., 36 Ohio State 370, 385 (1881),

> "In a strict legal sense, property, whether the term is applied to things animate or inanimate, consists in the right to their *use, enjoyment, and disposition.*" (Italics ours.)

In

The Chicago & Western Indiana R. R. Co. v. The Englewood Connecting Rwy. Co., 115 Ill. Rep. 375, 385 (1886),

the Court said:

". . . for property itself, in a legal sense, is nothing more than the exclusive right 'of possessing, enjoying and disposing of a thing,' which, of course, includes the use of a thing."

The Court said in

Jaynes v. Omaha Street R. Co., 53 Neb. 631, 653 (1898)

". . . 'Property' in its appropriate sense means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects and generally to the exclusion of all others and *doubtless this is substantially the sense in which the word is used in the constitution* as to the taking or damaging of private property for the public use."

The Court held in

Smith v. Campbell, 10 N. C. 595, 597 (1825),

"Property is a thing over which a man may have dominion and power to do with it as he pleases, so that he violates not the law. *He may give, grant, or sell it at his pleasure.*" (Italics ours.)

In

Eaton v. B. C. & M. R. R., 51 N. H. 504, 511 (1872),

the Court said:

"The term 'property,' although in common parlance frequently applied to a tract of land or a chattel, in its legal signification 'means only the rights of the owner in relation to it.' 'It denotes a right . . . over a determinate thing.' 'Property is the right of any person to possess, use, enjoy, and dispose of a thing.'"

It will be noted that in all these definitions of property the *right of disposition* is stated to be an essential element thereof.

Sometimes the courts refer to these rights of possession, use, enjoyment and disposition as essential attributes or incidents of property. Whether it is said such a right is an essential element, or attribute, or incident, the meaning is the same. Such a right is inherent in and is a constituent part of property. If such right be taken or destroyed, it is property which is taken and destroyed, and this the courts have uniformly held.

This Court said in

Buchanan v. Warley, 245 U. S., 60 (1917),

". . . Property is more than the mere thing which a person owns. It is elementary that it includes the right to *acquire, use, and dispose* of it. *The Constitution protects these essential attributes of property.*" (Italics ours.)

Of course the whole is the sum of *all* its parts; and if the Constitution protects property, it protects each of the incidents thereof. This leads naturally to

3. *The Gift Tax, since it is a tax upon an essential right inherent in property, is a tax upon property, and is therefore direct.*

(a) A tax upon property is a direct tax.

(b) A tax upon an essential incident or attribute of property is a tax upon property, and hence direct. A tax upon an inseparable incident of property, such as the right to give, is a tax upon property, just as a tax upon the income of property is a tax upon property.

A tax upon property, as slaves, is a direct tax:

Springer v. *U. S.*, 102 U. S., 586 (1880).

Even if the tax be only upon the income from property, still it is a tax upon property:

Pollock v. *Farmers' Loan & Trust Co., supra.*

This is because the product of property in substance and common sense so partakes of the nature of the producing property that a tax upon the income is a tax upon the property producing the income.

So a tax upon liquor is a tax upon property, even though the tax be disguised as an excise tax upon the "business" of withdrawing liquor from warehouses:

Dawson v. *Kentucky Distilleries Co.*, 255 U. S., 288 (1921).

This Court said:

"To levy a tax by reason of ownership of property is to tax the property. Compare *Thompson* v. *Kreutzer*, 112 Mississippi, 165; *Thompson* v. *McLeod*, 112 Mississippi, 383. It cannot be made an occupation or license tax by calling it so. See *Flint* v. *Minneapolis Syndicate*, 220 U. S. 187; *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S., 28."

In the case of *Thompson* v. *Kreutzer*, 112 Miss. 165 (1916), cited supra, an annual privilege tax or occupation fee upon each person pursuing the business of buying, owning or holding more than 1000 acres of land was held to be a tax upon property and hence unconstitutional. The Court said (p. 167):

> "Ownership is not a privilege conferred by Government, but is one of the rights which Governments were organized to protect . . .
>
> "A tax on a thing is a tax on all its essential attributes, and a tax on an essential attribute of a thing is a tax on the thing itself . . . Consequently, no tax can be imposed on the right of ownership, which is not also a tax on property."

This Court said in

Buchanan v. *Warley*, 245 U. S., 60 (1917),

". . . Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property."

Is it not true, as stated in

People v. *Otis*, 90 N. Y., 48, 52 (1882),

that

"Depriving an owner of property of one of its essential attributes is depriving him of his property"?

The right of gift is an essential element of property. It inheres in the disposal of property. The right to use and to enjoy one's property comprehends the right of gift. The right of gift is part and parcel of all the other elements of property, and is one of the most deeply rooted.

It follows that a tax on the right to give one's property away (an essential attribute of all property) is a tax on property and, therefore, a direct tax.

4. *The argument that unless all the incidents of property are taxed, the tax is not direct, is unsound.*

The Government argued below that a tax is not a tax on property unless it is a tax on *all* the essential incidents of property:

"There are many useful things which one may do with his property besides giving it away"!

That argument is clearly unsound; it is opposed to the principle of the *Pollock* case and the *Dawson* case, that a tax upon *any one* of the essential incidents of property is a tax upon property.

It cannot be denied that the right to give away one's own property is one of those incidents.

If a tax may be laid on one essential attribute of property because that attribute is not the only one, then there is no limit worthy the name to the power to tax property. Idle property may be taxed because it is idle. One's own home may be taxed because one is living in it. That is not an exclusive use of property. Property may be rented to some one else, and if rented would produce additional income and additional income tax.

Lands planted to certain crops may be taxed—because there are "other useful purposes" to which the land could be put.

To receive income from property is not the sole use to which property can be put. Yet a tax on income from property is a tax on property itself.

A person who invests in any sort of property which brings in no immediate income—any person who buys for the "long pull" and is satisfied with a meagre return meanwhile—might be taxed on such an investment. Such a tax does not interfere with the only uses of which the money is capable; there are many uses for money besides investing it in non-dividend-paying securities or in unproductive land. And such investments are an evasion of tax, because if the investments were made in interest-bearing securities the Government would receive additional income tax.

A person with large earning power might invest his entire assets in a large estate occupied by himself from which there is no income. In Great Britain such "evasions" are impossible, because one must pay "income tax" on the fair value of one's home, owned and occupied by one's self. But the Sixteenth Amendment permitted taxes on actual "income" only, not on income which might be earned if one chose to handle one's property differently.

Is it not clear that the test that there are other "useful things which one may do with one's property" is unsound?

If the remunerative *business* use of property—putting money out at interest—owning and receiving the interest on securities; receiving the rental from property—could not

be taxed except for the XVI Amendment, because that would be to tax the property itself, *a fortiori* a non-business, non-remunerative, purely social use of property, that is, the exercise of the primitive right to give it away, may not be taxed, for that would be to tax the property itself.

The case of Anderson v. McNeir, 16 Fed. (2d) 970 (1927) (Manton, *J.*) (reversing the Court below) may be said to have gone the limit in the effort to support the gift tax as a legislative device to prevent the rich from making gifts during their lifetime and thereby "evading the death duties on their estates."*

But the same act elsewhere taxes transfers made "in contemplation of death" irrespective of time—a contrary presumption being raised by two years' duration—and this would seem to be as far as, if not further than Congress may go in its zeal to tax estates. As well tax extravagance, or living expenses over $5000 a year, or college educations; all of these may diminish the estate which the Federal Government taxes. Graduated taxes on gifts to wives and children or friends—graduated taxes on purely social acts of generosity—graduated taxes aimed solely at the rich—it would have been difficult to predict that any Congress would go to such lengths.

In a nut-shell, Judge Manton's reasoning is:

(a) that in the case of a gift there is an "event" which is excisable;

(b) that excises relate to the exercise of rights of property; and

(c) that the gift tax is not a tax on property, because the right to give does not exhaust "those interests which together constitute the right of property so as to amount to the taking of the property" or make it "impossible to use it at all without incurring the tax."

*Note: Since reversed by stipulation on the authority of *Blodgett* v. *Holden*, *supra*.

As to (a): Aside from inheritance taxes, excisable "events" are business transactions. Historically, the State has always claimed dominion over the property of dead persons. It has never attempted to forbid, regulate, or tax generous impulses. This is the first time in which there is even color for the assertion that the Government has attempted to single out isolated social transactions, and visit such transactions with liability to a tax on the "privilege" of making same.

"The happening of an event," Manton, *J.*, says justified the tax. Surely there are "events" taxes on which should be so arbitrary and absurd as to be beyond the power of Congress: marriages, births, as well as gifts in recognition thereof, would seem to be so local and personal—like looking out of one's window—as not to be excisable. A dinner may be an "event," so may any other social function. Is it excisable, and if not, why not? A social promise is said not to be a contract; is it an "event" which is excisable?

As to (b): There is no case applicable in principle sustaining as an excise the exercise of so inherent, indispensable and ordinary an attribute of property as the voluntary and free disposition thereof.

As to (c): In other words, Judge Manton's thesis is that there cannot be a taking of property unless the property is taken *in toto;* that a tax on an ordinary user of an indispensable attribute of property is not a tax on property unless it excludes every other user. The position is wholly untenable. There *can* be a "taking" without taking the fee. Any serious diminution of the enjoyment of property is a "taking":

> *Portsmouth Harbor Land & Hotel Co.* v. *U. S.*, 260 U. S. 327 (1922);
> *Peabody* v. *U. S.*, 231 U. S. 531, 538 (1913).

> "Depriving an owner of property of one of its essential attributes, is depriving him of his property."
> *People* v. *Otis, supra.*

Likewise, there can be a taxing of property without a taxing of all the attributes of property, or excluding every other possible user. A tax on the rentals of property is a tax on "user." The owner may occupy the property, or permit it to lie fallow and gain the unearned increment —as in the Distilleries Company case [255 U. S. 288 (1920)], the owner of the whiskey might have allowed his whiskey to remain in the warehouse. A tax on the use of land for raising hops or grapes—or rye—would not preclude all other uses of the property, yet it would be a tax on property.

Is not "keeping" a use—the right to decide not to spend, or invest, or give away? Is it excisable? Surely an attempted Federal experiment to bring in a socialistic state by graduated taxes on the idle riches of the idle rich would have to be apportioned. Yet, according to defendant, such a tax would be valid, because one might spend, or invest, or give away.

One may spend, trade, hoard or give: All these may be regarded as "uses." One may keep, or part with by spending, or by investing or giving.

The owner of whiskey has a right to hoard it. That might be one use; but he may not be taxed by a State on the "business" of withdrawing it:

Dawson v. *Kentucky Distilleries Co., supra.*

Investing is a use. Could there be a graduated excise tax on investing? Spending is a use. Could there be a graduated excise tax on spending? Land lying fallow may be said to be "used." Could there be a valid "excise" (a la Henry George) tax on unused land?

The Government argued below that the tax is saved because it does not include *all* gifts; it exempts, forsooth, gifts to charity. Hence it is not a tax upon property because it does not deprive one altogether of the use of property. One may give it to charity! One may give $1,000,000 to charity, but may not give $100,000 to one's wife or

son. Charity may not begin at home. But because of the gracious exemption of public charities, the obvious interference with, and imposition upon, an inseparable incident of property is validated.

5. *Indirect taxes are of three kinds only. The Gift Tax falls into none of these categories, and is therefore direct.*

Courts have rarely attempted to define direct or indirect taxes, but have preferred to decide in each case as it arose, as witness Chief Justice Fuller in

> Thomas v. United States, 192 U. S. 363, 370 (1904),
>
> "There is no occasion to attempt to confine the words 'duties, imposts and excises' to the limits of the precise definition. We think they are used comprehensively to cover customs and excise duties imposed upon importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, occupations and the like."

It is submitted that the true rule is that the *nature of the tax depends upon the nature of the thing taxed.* If the tax is a tax upon a person or upon property it is a *direct* tax; if on a privilege it is an *excise* and is *indirect.*

The Government contends that the tax "is not a direct tax growing out of the general ownership of property, but is a tax on the transfer of property by gift. The tax is, therefore, an excise and as such must meet only the Constitutional requirement of uniformity."

It is submitted that indirect taxes can be divided into three classes:

(a) Inheritance taxes (including inheritance taxes proper, legacy taxes, and estate taxes);

(b) Privilege or business taxes; and

(c) Taxes upon articles of luxury.

(a) Inheritance taxes as above defined are indirect taxes because, as this Court has said in

New York Trust Co. v. Eisner, 256 U. S. 345 (1920),

"This kind of tax always has been recorded as the antithesis of a direct tax; 'has ever been treated as a duty or excise, because of the particular occasion which gave rise to its levy.' 178 U. S. 81-83. Upon this point a page of history is worth a volume of logic."

(These historical considerations are inapplicable to a gift tax. There is no natural right to transmit one's property by will, or otherwise, at one's death, or to receive a legacy or a devise. The inheritance tax itself was a war-time invasion of a customary domain of State taxation and has resulted in complications followed by numerous changes in the law, so that now 80 per cent. of the Federal Inheritance Tax is in effect released to the States. Act of June 2, 1924, c. 234, Sec. 301 (b), 43 Stat. 303; Act of Feb. 26, 1926, c. 27, Sec. 301 (b), 44 Stat. 70.)

(b) Business taxes. The following taxes fall under the category of privilege or business taxes:

(a) On the privilege of engaging in the insurance business (measured by gross receipts):

Pacific Insurance Co. v. Soule, 7 Wallace 433 (1868).

(b) On the privilege of a State bank to issue bank notes for use as currency:

Veazie Bank v. Fenno, 8 Wallace 523 (1869).

(c) On the privilege of doing business at "exchanges" a war tax:

Nicol v. Ames, 173 U. S. 509 (1899).

(d) On the privilege of selling "calls" for stock:

Treat v. White, 181 U. S. 264 (1901).

(e) On the privilege of selling tobacco:

Patton v. Brady, 184 U. S. 608 (1902).

(f) On the privilege of disposing of property in the form of certificates (of stock):

Thomas v. U. S., 192 U. S. 363 (1904).

(g) On the privilege of engaging in the sugar refining business:

Spreckles Sugar Ref. Co. v. McClain, 192 U. S. 395 (1904).

(h) On the privilege of engaging in the business of making oleomargarine:

McCray v. U. S., 195 U. S. 27 (1904).

(i) On the privilege of doing business in the form of a corporation:

Flint v. Stone Tracy Co., 220 U. S. 107 (1911).

The above are all business taxes. They seem to have been held to be indirect for three reasons: (1) because most of them were technically taxes on some activity which the Government might well have had the power to regulate under some conferred power other than the power to tax; (2) because technically the tax need not be assumed, since doing the act taxed was a matter of the volition of the person concerned; and (3) on the ground that the tax could be shifted to the ultimate consumer, who thus paid the tax indirectly in the form of an increased price for some article of consumption.

(c) Luxury taxes.

The following taxes upon articles of luxury have been held to be indirect, partly on historical grounds and partly on the psychological ground that articles of luxury are a good mark for taxation:

(a) taxes on tobacco, liquors, etc.:

Patton v. Brady, 184 U. S. 608 (1902).

(b) taxes on foods:

McCray v. U. S., 195 U. S. 27 (1904).

(c) a tax upon the use of foreign-built yachts:

Billings v. U. S., 232 U. S. 261 (1914).

(d) a tax upon carriages:

Hylton v. U. S., 3 Dallas 171 (1796).

It is obvious that the things taxed in all these cases are *privileges,* since from time immemorial business has existed only on sufferance of the crown and has been subject to business regulation and interference.

It is impossible too strongly to emphasize the fact that indirect taxes are essentially *business* taxes. Except for inheritance taxes and an isolated instance or two of luxury taxes, every kind of indirect tax is connected in some way with some matter of business as that word is commonly understood, from the simple transaction of a sale of real estate to the most complicated form of occupation tax. The business element is ever present.

It is obvious that the gift tax is not in any sense a *business tax.* The making of a gift is not a *business transaction.* It requires no medium of exchange. It has none of the incidents of barter. Indeed the idea of making gifts negatives at once any element of business: the two terms are mutually inconsistent and irreconcilable. Of course it is not an inheritance tax.

It has been shown that indirect taxes fall into the two classes of inheritance and business taxes; that the gift tax is in neither class; and that *all indirect taxes are taxes on privileges of one kind or another.* It has never been suggested that a right is the subject of indirect taxation.

Is there anything else to show that the gift tax is not *indirect?* We may refer back to Chief Justice Fuller's definition in

> Thomas v. United States, 192 U. S. 363-370 (1904),

> "The words, 'duties, imposts and excises' . . . are used comprehensively to cover customs and excise duties, imposed upon importation, consumption, manufacture, and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like."

Clearly, a gift is not a matter of "importation" or "manufacture"; it has nothing to do with the "consumption . . . of certain commodities," nor with their sale. In this connection, it is well to note Chief Justice Fuller's phraseology: "sale of certain commodities," for the Supreme Court intimated, in Nicol v. Ames, 173 U. S. 509, 521, that a general tax on all sales would be direct:

> "A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale *differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property.* It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded."

A fortiori, this is true of a tax on gifts.

Making a gift is not any kind of a "business transaction," nor is it a "vocation" or "occupation." The only chance of holding the gift tax to be an excise comes from the *omnium gatherum,* "and the like," but no one would say that a gift is "like" any one of the subjects of indirect taxation mentioned by the Chief Justice.

The District Judge relies upon *Hylton* v. *U. S.,* 3 Dallas 171 (1796). There a tax upon carriages was held indirect. This case was so fully analyzed and considered in the major

opinions in the Pollock cases as to excuse extended comment. If a tax on property is not a direct tax, then a tax on the income from property could not be a direct tax. The carriage tax was sustained by Mr. Justice Chase (p. 175) as a tax on "expense . . . on . . . a consumable commodity." The tax here is not in any sense a tax on an expense.

II. The Tax Is Arbitrary and Unreasonable Because Graduated and Otherwise Lacking in Uniformity.

The tax imposed by the Act of 1924 varies from "1 per centum of the amount of taxable gifts not in excess of $50,000" to "40 per centum of the amount by which the taxable gifts exceed $10,000,000" (Sec. 319). It is, then, a graduated tax. Such a tax is unconstitutional.

The State of Wisconsin imposed a graduated tax upon inheritances, including all transfers *mortis causa*. The Act provided that transfers within six years of the transferor's death were to be conclusively presumed to have been made in contemplation of death. The Statute was held unconstitutional: Schlesinger v. Wisconsin, 270 U. S. 230 (1925), Mr. Justice McReynolds saying, p. 240:

> "Gifts *inter vivos* within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have been so made without regard to actualities, while like gifts at other times are not thus treated. There is no adequate basis for this distinction. Secondly, They Are Subjected to Graduated Taxes Which Could Not Properly Be Laid On All Gifts or, Indeed, Upon Any Gift Without Testamentary Character."

As applied to gifts, *a graduated excise* is a plain abomination. Graduation is not uniformity; uniformity here means sameness. If a man who owned 100 acres was placed in a different class and taxed at a rate twice as high as his

neighbor owning fifty acres, would he be given the equal protection of the laws?

Myles Salt Co. v. *Iberia Drainage District*, 239 U. S. 478 (1915);

Gast Realty and Investment Co. v. *Schneider Granite Co.*, 240 U. S. 55 (1916);

Cope's Estate, 191 Pa. 1 (1899).

Smith v. Loughman, 245 N.Y. 486, 492, 495 (1927) (Cardozo, C

If a general sales tax were passed taxing only sales over $500, and graduated so as to hit hardest the largest concerns, would such a tax, State or Federal, be valid as "due process" or "equal protection"?

In the case of a sale, the seller who gets the money for goods pays. In the case of a gift, money passes from one owner to another. There is no profit out of which to pay the excise; no change in the general wealth. *But the gift tax taxes part of the remaining capital of the giver in a ratio graduated according to his generosity.*

Moreover, the act discriminates between residents and non-residents. A resident citizen is allowed a general exemption of $50,000. No such exemption is allowed to a non-resident. (Sec. 321.) This is arbitrary. On the other hand there is a discrimination against the resident citizen. He is taxed on all transfers of "property wherever situated," while the non-resident citizen is taxed only on transfers of "property situated within the United States." (Sec. 319.) Thus an American citizen, resident in Europe, may remove all his personal property and give it away and avoid the gift tax; but a resident citizen cannot do this. A resident citizen must pay a gift tax on his transfer of French real estate; a non-resident need not.

In addition the tax makes an arbitrary discrimination based upon the amount of individual gifts. "Gifts the aggregate amount of which to any one person does not exceed $500" per annum are exempt. $51,000 may be equally di-

vided among 102 people without tax. If divided amongst 101 persons, the donor is taxable. The foregoing would seem to be not only unreasonable, but reasonless.

Mr. Attorney-General Olney, in his argument for the United States in the Pollock case, 157 U. S., 504 (1894), said that the word "uniform" might as well be out of the Constitution as in it because "it simply designates and describes an essential element of every tax—an element which is inherent in every valid tax and the absence of which would be sufficient to annul an attempted exercise of the taxing power."

And Mr. Justice Field, in the same case, said, at pp. 595-6:

> "A law containing arbitrary exemptions can in no just sense be termed uniform. . . .
>
> "It (the graduated income tax) thus vitiates, in my judgment, by this arbitrary discrimination, the whole legislation. Hamilton says, in one of his papers (the Continentalist), 'the genius of liberty reprobates everything arbitrary or discretionary in taxation. It exacts that every man, by a definite and general rule, should know what proportion of his property the State demands; whatever liberty we may boast of in theory, it cannot exist in fact while (arbitrary) assessments continue.' 1 Hamilton's Works, Ed. 1885, 270."

Whether the levy be regarded as direct or indirect, then, its imposition violates due process. The same rule as to equality as inherent in the nature of a tax must apply alike to state legislatures and to Congress. *Unreasonable, arbitrary classification violates "due process" quite as much as it violates the equal protection clause.*

This salutary rule applies with equal force to an attempt to graduate so-called "taxes" according to the size of the subject matter irrespective of any difference in nature or quality. If graduated taxes are permitted in general, then legislatures may, through the medium of such taxes, not

only discourage, but in effect prohibit size which comes as the result of success. This may be resorted to as an additional avenue of attack upon big business. Freedom includes the freedom to grow and to be successful and to abound, uninterfered with by taxation proportioned to the extent of success and having the necessary consequence of discouraging and diminishing success.

In *Frost* v. *Corporation Commission of Oklahoma*, Supreme Court, this Court, per Mr. Justice Sutherland, said (Opinion February 18, 1929):

> "The purpose of the clause in respect of equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances. *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 37. This Court has several times decided that a corporation is as much entitled to the equal protection of the laws as an individual. *Quaker City Cab Co.* v. *Penna.*, 277 U. S. 389, 400; *Kentucky Co.* v. *Paramount Exch.*, 262 U. S. 544, 550; *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 154. The converse, of course, is equally true.
>
> "A classification which is bad because it arbitrarily favors the individual as against the corporation certainly cannot be good when it favors the corporation as against the individual. In either case, the classification, in order to be valid, 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415; *Air-way Corp* v. *Day*, 266 U. S. 71, 85; *Scheslinger* v. *Wisconsin*, 270 U. S. 230, 240. That is to say, mere difference is not enough; the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 155." *Louisville Gas Co.* v. *Coleman, supra, p.* 37.

A tax graduated according to size is a multiple tax; the additional taxes in the higher brackets are taxes which are not levied upon the *same* thing in the lower brackets. The subject matter is identical, except as to size. The sur taxes are essentially arbitrary, lacking in uniformity, contrary to the very nature of a tax.

While graduated taxes upon incomes and upon estates have been upheld, we submit that judicial sanction should not be given to any further extension. If, as Attorney General Olney said, uniformity is inherent in the nature of a tax, then a classification based solely upon size is arbitrary and capricious. If the principle of permitting graduated taxes is extended, then houses may be taxed at different rates, according to the number of their windows; farms may be taxed at a certain rate on the first hundred acres, and then a step up rate for each succeeding hundred acres; and business may be taxed according to volume at a certain rate on the first million and a step up rate on each succeeding million.

III. Conclusion.

Every new assumption of Federal power contrary to the Constitution is not merely a violation of faith, it is also an aggression against the rights of States and the people thereof.

To give is to exercise an ordinary and indispensable right inherent in property itself. To tax that right is to tax property itself.

It was of the essence of the original compact that the Congress should have no power to levy a direct tax without apportionment. From the point of view of common sense and substance the Congress has violated that compact. If generosity is to be taxed at all, the power is one reserved exclusively to the States. Some subject matters of taxation beside land should be within the exclusive jurisdiction of the States.

Property is of the essence of civilization; the power t
give is of the essence of property; whatever takes away o
taxes that right to give is a direct burden upon propert
qua property. The gift tax is a direct tax.

Respectfully submitted,

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No. 27

In the Supreme Court of the United States

OCTOBER TERM, 1929

JOSEPH H. BROMLEY

v.

BLAKELY D. McCAUGHN, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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Revenue act of 1928, c. 852, sec. 404, 45 Stat. 791, 863 15

Congressional Record, vol. 65:
Pt. 3, pp. 3119, 3120 15
Pt. 4, pp. 3170, 3172 15
Pt. 8, pp. 8094, 8097 15

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 27

JOSEPH H. BROMLEY

v.

BLAKELY D. McCAUGHN, COLLECTOR OF INTERNAL REVENUE for the First District of Pennsylvania

---

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the District Court is reported in 26 F. (2d) 380.

JURISDICTION

The case is here on the certificate of the Circuit Court of Appeals under Section 239 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS CERTIFIED

The questions presented by the certificate are these:

tion was assessed and collected are not unconstitutional and accordingly entered judgment for the defendant. The plaintiff appealed.

SUMMARY OF ARGUMENT

While general property taxes are direct taxes, taxes upon transfers of property are excises. The gift tax is imposed only upon the exercise of the right to make a gift. Use is distinguishable from ownership and it is settled that taxes upon the use are not direct taxes which must be apportioned. No question of retroactivity is involved. When dealing with the question of constitutionality, the presumption is in favor of the validity of the statute.

The due process clause of the Fifth Amendment is not a limitation upon the taxing power unless it is exercised in so arbitrary and capricious a manner as to amount to confiscation. The principle of graduated rates has been sustained uniformly, and they have a special justification in this Act since they are a counterpart of the estate-tax rates and the gift tax was imposed largely to prevent avoidance of the estate tax. It is also settled that reasonable exemptions are proper. There is nothing arbitrary in the exemptions and classifications in this Act.

ARGUMENT

I

THE TAX UPON TRANSFERS OF PROPERTY BY GIFT IS NOT A DIRECT TAX BUT AN EXCISE

This case presents the question left undecided in *Blodgett* v. *Holden*, 275 U. S. 142, and *Untermyer*

v. *Anderson*, 276 U. S. 440, namely, the validity of a tax upon gifts *inter vivos* as applied to transfers subsequent to the effective date of the Act. Aside from certain transfers in a total amount within the statutory exemption, the transfers in those cases were made prior to the effective date of the statute imposing the tax, and this Court held that as applied to such transactions, the tax was arbitrary and invalid under the due process clause of the Fifth Amendment.

In the instant case the transfers were made during 1925, after the effective date of the statute, June 2, 1924, and hence there is no question of retroactivity.

The answer to the first question certified requires a determination whether the statute imposes a direct tax which must be apportioned among the several States under Section 2, Clause 3, and Section 9, Clause 4, of Article I of the Constitution.

The fact that the gift tax is novel is not sufficient to render it unconstitutional and this is true despite the fact that the classification of taxes is largely historical. If gifts *inter vivos* offer a field for the imposition of a constitutional excise tax, the Act will not be declared invalid because of the belated exercise of congressional power.

The decisions of this Court afford no precise definition of a direct tax, but it was early settled that the term includes a capitation tax and a tax upon land. Prior to *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, it was thought that those were

the sole instances of the direct tax referred to in the Constitution. *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, 19. However, it has now become established that the constitutional rule of apportionment had its origin in the purpose to require that taxes on persons solely because of their general ownership of property should be levied upon the States in proportion to their population, and that there is no sound distinction between a tax levied on a person solely by reason of his general ownership of real property and the same tax imposed solely because of his general ownership of personal property. It is also settled that a tax on the income derived from either real or personal property is the legal equivalent of a direct tax on the property from which the income is derived. *Pollock* v. *Farmers' Loan & Trust Co., supra; Knowlton* v. *Moore,* 178 U. S. 41, 82.

However, the tax in this case is not a direct tax growing out of the general ownership of property, but is a tax upon a particular use of that property. It is not a tax directly upon the existence of the right to use the property but a tax upon the exercise of that right. That such a tax is an excise is indicated by the statement in *Knowlton* v. *Moore,* 178 U. S. 41, 88:

> Excises usually look to a particular subject, and levy burdens with reference to the act of manufacturing them, selling them, etc.

That there is a substantial difference between the passive right and the active exercise of that right is

shown by the decisions of this Court in *Billings* v. *United States*, 232 U. S. 261, where a tax upon the exercise of the right to use a foreign-built yacht was sustained as an excise tax. Emphasizing the distinction between potential use and actual use, in *Pierce* v. *United States*, 232 U. S. 290, where a foreign-built yacht was out of commission during the entire taxable period, it was held that the owner was not liable for the tax.

An examination of the decisions of this Court shows that the following have been sustained as indirect taxes:

Taxes on particular types of sales, *Nicol* v. *Ames*, 173 U. S. 509; *Thomas* v. *United States*, 192 U. S. 363.

A tax upon the use of carriages for the conveyance of persons, *Hylton* v. *United States*, 3 Dall. 171.

A tax upon the amount of notes paid out by any State bank, *Veazie Bank* v. *Fenno*, 8 Wall. 533.

A tax upon manufactured tobacco having reference to its origin and intended use, *Patton* v. *Brady*, 184 U. S. 608.

A tax upon the manufacture and sale of colored oleomargarine, *McCray* v. *United States*, 195 U. S. 27.

A succession tax upon the devolution of title to real estate, *Scholey* v. *Rew*, 23 Wall. 331.

A tax on legacies, *Knowlton* v. *Moore*, 178 U. S. 41.

Taxes on doing business by particular methods, *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397; *Stratton's Independence* v. *Howbert*, 231 U. S. 399; *Doyle* v. *Mitchell Brothers Co.*, 247 U. S. 179; *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103.

In *Keeney* v. *New York*, 222 U. S. 525, the transfer of property in trust to be held during the grantor's lifetime with provision for its transfer after her death was treated as a transfer *inter vivos* and a State statute imposing a tax upon such transfer was held to be an excise rather than a property tax. In *Nichols* v. *Coolidge*, 274 U. S. 531, 541, this Court said:

> Certainly, Congress may lay an excise upon the transfer of property by death * * *.

We submit that a similar tax upon the transfer of property by gift *inter vivos* is likewise an excise.

Nor can it be doubted since *Knowlton* v. *Moore*, *supra*, and *New York Trust Co.* v. *Eisner*, 256 U. S. 345, that a tax may be indirect even though inevitable. Ability to shift the tax from the person upon whom it first falls is not a necessary element.

No decision of this Court classifies as direct a tax imposed on a particular use of property. In *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288, relied upon by the taxpayer, the basis of decision was (p. 294) that "the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of

the only uses of which it is capable, *i. e.*, consumption, sale or keeping for future consumption or sale," and that "the whole value of the whisky depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value." No transfer of the property by its owner nor any particular use thereof by him was the occasion for the tax.

A tax upon the transfer of property by gift is not equivalent to a tax upon property because of its ownership. It does not interfere with "the only uses of which it is capable." There are many useful things which one may do with his property besides giving it away.

From the above cited cases it appears that the use of property is distinguishable from the ownership of property and that indirect taxes may properly be based upon the use. This is illustrated by the opinion of this Court in *Nicol* v. *Ames*, 173 U. S. 509, where the validity of a tax upon the sale of commodities on boards of trade and exchanges was challenged on the ground that it was an unapportioned direct tax. With respect to this point, this Court said (pp. 518–519):

> It is asserted to be a direct tax, because it is a tax upon the sale of property measured by the value of the thing sold, and such a tax is a direct tax upon the property itself, and therefore subject to the rule of apportionment. Various cases are cited, from *Brown* v. *Maryland*, 12 Wheat. 419, down to those

involving the validity of the income tax, 157 U. S. 429; 158 U. S. 601, for the purpose of proving the correctness of this proposition. All the cases involved the question whether the taxes to which objection was taken amounted practically to a tax on the property. If this tax is not on the property or on the sale thereof, then these cases do not apply.

We think the tax is in effect a duty or excise laid upon the privilege, opportunity or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act. It is not a tax upon the business itself which is so transacted, but it is a duty upon the facilities made use of and actually employed in the transaction of the business, and separate and apart from the business itself. It is not a tax upon the members of the exchange nor upon membership therein, nor is it a tax upon sales generally. The act limits the tax to sales at any exchange, or board of trade, or other similar place, and its fair meaning is to impose a duty upon those privileges or facilities which are there found and made use of in the sale at such place of any product or merchandise. Whether this facility or privilege is such a thing as can be legally taxed, while leaving untaxed all other sales made outside of such places, will be discussed further on. At present it is enough to say that the tax is not upon the property sold, and cannot on that ground be found to be direct.

Again, in *Billings* v. *United States, supra* (pp. 280–281), the Court said:

> It is to be observed that the provision deals with ownership and distinguishes between ownership and use, since it bases the tax not upon the former but upon the latter. From this it follows that it is not ownership but the election during the taxing period of the owner to take advantage of one of the elements which are involved in ownership, the right to use which is the subject upon which the statute places the excise duty. In this view the fact of use, not its extent or its frequency, becomes the test, as distinguished from mere ownership, for that in the statutory sense could exist without use having taken place. The words of the statute under this construction were used in an every-day sense and not in a technical one: in other words but convey the distinction without reference to nice analysis of the nature of things which is commonly conceived to exist between ownership and use. Let it be conceded that the ownership of property includes the right to use, plainly we think, as use and ownership are distinguished one from the other in the provision, the word "use" as there employed means more than the mere privilege of using which the owner enjoys, and relates to its primary signification, as defined by Webster; "The act of employing anything or of applying it to one's service; the state of being so employed or applied." If the use which arises from the fact of ownership without more was what the

statute proposed, then it is inconceivable why the difference between use and ownership was marked in the provision and made the basis of the tax which it imposed. While this construction in this case leads to the same conclusion as does that which the court below affixed to the statute, that is, that it taxed the privilege of use, or, in other words the potentiality of using involved in ownership, inherently there is this fundamental difference between the interpretation we give and that which the lower court adopted, since the privilege of use is purely passive (or subjective), a right which necessarily pertains to ownership and must exist where there is ownership, as one may not obtain ownership without acquiring the privileges of use which ownership gives. The other, on the contrary, that is, use in the statutory sense, although it arises from ownership, is active (objective), that is, it is the outward and distinct exercise of a right which ownership confers but which would not necessarily be exerted by the mere fact of ownership.

This Court again distinguished between ownership and use in *Bowman* v. *Continental Oil Co.*, 256 U. S. 642. In that case the constitutionality of a State statute imposing a tax upon gasoline sold or used was challenged because it was a property tax and not levied in compliance with the requirements of the State constitution. But this Court held that the tax was in fact an excise and not a property tax.

After full consideration of the above cases the gift tax has been sustained by the District Court for the Western District of Michigan, *Blodgett* v. *Holden,* 11 F. (2d) 180, and the Circuit Court of Appeals for the Second Circuit, *Anderson* v. *McNeir,* 16 F. (2d) 970. Since this Court held the statute invalid as it was retroactively applied in *Blodgett* v. *Holden,* 275 U. S. 142, it was found unnecessary to answer the certified question dealing with the classification of the tax as direct or indirect. After the decision in that case, *Anderson* v. *McNeir,* was reversed in this Court on confession of error, 275 U. S. 577, with the result that the classification of the tax has not yet been considered by this Court. The question is now pending in another case upon a writ of certiorari from the decision of the Circuit Court of Appeals for the Second Circuit upholding the tax, *O'Connor* v. *Anderson,* 28 F. (2d) 873 (No. 33, October Term, 1929), in which a stipulation has been filed that it shall abide the decision of this Court in the instant case.

An analysis of the practical nature and actual results of the tax in the case at bar (see *Nicol* v. *Ames,* 173 U. S. 509, 515) demonstrates that it is not the ownership of property which is taxed but the election of the owner to take advantage of one of the elements which are involved in ownership, the right to make a gift. The tax is laid upon the exercise of that right and is comparable to the tax upon the exercise of the right to use the yacht in

the *Billings case* and the tax upon the exercise of the right to sell gasoline in the *Bowman case*. Neither the property nor any of the incidents of ownership are taxed in the hands of either the donor or the donee. The gift tax is imposed only after the actual transfer, at which time the title and ownership of the donor have ceased by reason of the gift. Hence the tax does not fall upon the donor until after the termination of his ownership and we submit that it is plainly an excise tax upon the exercise of the right, and not a direct tax which is required to be apportioned.

The only distinction between a gift and a devise is that the latter is a statutory, not a common-law privilege; but this could hardly be sufficient to invalidate a tax upon the former at the same time that the validity of a tax upon the latter is recognized. Among the cases cited above are some upholding the right to tax the exercise of the privilege of sale which, like the privilege of disposing of property by gift, is a natural right. It is difficult to formulate a reason why a tax upon the exercise of the right to make a sale of property differs in principle from a tax upon the exercise of the right to make a gift of property. Our contention that there is no difference is supported by the following excerpt from the dissenting opinion of Mr. Justice Holmes, concurred in by Mr. Justice Brandeis and Mr. Justice Stone in *Untermyer* v. *Anderson*, 276 U. S. 440, 446:

> I do not imagine that the authority of Congress to tax the exercise of the legal power to make a gift will be doubted any more than its authority to tax a sale.

The gift tax imposed by the Revenue Act of 1924 introduced a new type of Federal taxation. It was appended to the estate-tax provisions to supplement that tax and to make it effective. The estate tax and the gift tax are in *pari materia* and progressively in execution of the power to raise revenue. This is not to use the power of taxation for an ulterior purpose, as in the *Child Labor Tax Case,* 259 U. S. 20. There can be no doubt that the gift tax was enacted by Congress as a means of making the estate tax effective. By splitting up large fortunes and making absolute gifts *inter vivos,* the estate tax was being avoided (65 Cong. Rec., Pt. 3, pp. 3119, 3120; Pt. 4, pp. 3170, 3172; Pt. 8, pp. 8094, 8097). Adequate provision was made for crediting the gift tax against the estate tax where the amount of the gift is later required to be included in a decedent's gross estate. (Sec. 322, Rev. Act 1924, and Sec. 404, Rev. Act 1928.)

The presumption in this case, of course, is in favor of the validity of the statute. And this presumption, repeatedly indulged, is particularly strong when considering a Revenue Act. *Nicol* v. *Ames,* 173 U. S. 509. As shown above, this statute is an integral part of an entire taxing scheme considered necessary by Congress for satisfying the

needs of the Government for revenue. This Court has often recognized that a measure may be valid as a necessary adjunct to something which clearly lies within the legislative power, even though, standing alone, its constitutionality might have been subject to doubt. *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, *Ruppert* v. *Caffey*, 251 U. S. 264, *Everard's Breweries* v. *Day*, 265 U. S. 545, *Taft* v. *Bowers*, 278 U. S. 470.

II

PROGRESSIVE RATES OF TAXATION AND PROPER EXEMPTIONS VIOLATE NO CONSTITUTIONAL PROVISIONS APPLICABLE TO FEDERAL TAXATION

In the second question the Circuit Court of Appeals seeks the guidance of this Court with respect to whether the fact that the statute imposes a tax which is graduated and subject to exemptions makes it (a) repugnant to the first clause of Section 8 of Article I of the Constitution requiring uniformity of duties, imposts and excises throughout the United States; or (b) violative of the Fifth Amendment to the Constitution forbidding the depriving of any person of his property without due process of law.

In *Knowlton* v. *Moore*, 178 U. S. 41, 92, the provisions of the War Revenue Act of 1898, c. 448, 30 Stat. 448, which imposed a tax upon legacies, were challenged upon similar grounds. It was demonstrated conclusively that from the very first Congress the practice under the Constitution had disregarded the rule of inherent uniformity, that is,

intrinsically equal and uniform taxes, but it was shown that the principle of geographical uniformity had been consistently enforced. A review of Congressional legislation (p. 98 *et seq.*) exhibited the fact that from the foundation of the Government taxes have been imposed in proportion to ability to bear the burden and the objection to the progressive rate feature of the statute was held to be without merit.

The progressive feature of the income-tax provisions of the Tariff Act of October 3, 1913, c. 16, 38 Stat. 166, was likewise challenged in *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1. Upon the authority of *Knowlton* v. *Moore, supra,* it was held (p. 25) that there was an absolute want of foundation for the contention and that it was necessarily foreclosed by the earlier ruling. The objection that the tax was in violation of the Fifth Amendment was held to be without basis (p. 24) "since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause. *Treat* v. *White,* 181 U. S. 264; *Patton* v. *Brady,* 184 U. S. 608; *McCray* v. *United States,* 195 U. S. 27, 61; *Flint* v. *Stone Tracy Co., supra; Billings* v. *United States,* 232 U. S. 261, 282. * * *" See also *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103, 111; *Tyee Realty Co.* v. *Anderson,* 240 U. S. 115; *Billings*

v. *United States,* 232 U. S. 261, 282; *Flint* v. *Stone-Tracy Co.,* 220 U. S. 107, 173; *High* v. *Coyne,* 178 U. S. 111.

The cases cited above definitely settle the principle that the uniformity required by the Constitution has reference merely to geographical uniformity and that the due process clause of the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress, unless it is exercised in so arbitrary and capricious a manner as to amount to confiscation, as in *Nichols* v. *Coolidge, supra.* The amount of the tax must be determined by some standard and this Court has already said that to require the same amount to be paid on all transfers is not so fair as to impose the burden in proportion to the value of the property. *Keeney* v. *New York,* 222 U. S. 525, 534.

The power of Congress in levying taxes is very wide and where a classification is made of taxpayers that is reasonable and not merely arbitrary and capricious, the Fifth Amendment can not apply. *Barclay & Co.* v. *Edwards;* 267 U. S. 442, 450.

Schlesinger v. *Wisconsin,* 270 U. S. 230, 240, does not support the contention that a graduated tax is invalid. That case, as well as the others cited in support of the contention that the tax is not uniform, dealt with the equal protection clause of the Fourteenth Amendment. The Fifth Amendment, as this Court has so often said, has no equal protection clause, and cases dealing with restrictions upon the States are not in point when considering Fed-

eral taxes. Thus in *LaBelle Iron Works* v. *United States,* 256 U. S. 377, 392, it was said:

> Reference is made to cases decided under the equal protection clause of the Fourteenth Amendment (*Southern Ry. Co.* v. *Greene,* 216 U. S. 400, 418; *Gast Realty Co.* v. *Schneider Granite Co.,* 240 U. S. 55); but clearly they are not in point. The Fifth Amendment has no equal protection clause; and the only rule of uniformity prescribed with respect to duties, imposts, and excises laid by Congress is the territorial uniformity required by Art. I, § 8. *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, 557; *Knowlton* v. *Moore,* 178 U. S. 41, 98, 106; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 150; *Billings* v. *United States,* 232 U. S. 261, 2[illegible]. *Brushaber* v. *Union Pacific R. R. Co.,* [illegible]0 U. S. 1, 24. That the statute under consideration operates with territorial uniformity is obvious and not questioned.
>
> Appellant cites *Looney* v. *Crane Co.,* 245 U. S. 178, 188, and *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, 145, but these cases also are inapplicable, being based upon the due process clause of the Fourteenth Amendment, with which state taxing laws were held in conflict because they had the effect of imposing taxes on the property of foreign corporations located and used beyond the jurisdiction of the taxing State. There is no such infirmity here.

Moreover, the cited language from the *Schlesinger* opinion had reference to the Wisconsin statute

imposing inheritance taxes, providing that gifts made in contemplation of death should be included in the taxable estate, and making a conclusive presumption that gifts within six years of death had been so made. That case is only authority for the proposition that graduated *inheritance* taxes could not properly be laid upon a gift unless it was testamentary in character, and that the tax could not be upheld as an excise on gifts *inter vivos* because it reached only those made within six years of death and exempted all others, which would be wholly arbitrary.

This Court has already sustained the principle of graduated rates upon legacies, *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 299; *Knowlton* v. *Moore, supra;* and upon income, *Brushaber* v. *Union Pac. R. R., supra; Burk-Waggoner Oil Association* v. *Hopkins,* 269 U. S. 110; *Tyee Realty Co.* v. *Anderson,* 240 U. S. 115. This Court has said "That which is settled beyond dispute may not be disregarded and be brought into the realm of that which is controvertible and questionable by the mere garb in which propositions are clothed." *Billings* v. *United States,* 232 U. S. 261, 284.

Furthermore, the graduated rates have a special justification in this Act. The gift tax was imposed largely to prevent avoidance of the estate tax by gifts *inter vivos* and accordingly it was necessary to adjust the rates upon gifts to equalize the rates upon estates. This Congress has done. Compare Sections 301 and 319 of the Revenue Act of 1924.

The avoidance of the estate tax could not be adequately prevented unless the gift tax provisions contained the same graduated rates. Congress was no more powerless to graduate the rates than it was to impose the tax itself.

Accordingly we submit that, unlike *Nichols* v. *Coolidge, supra,* there is no arbitrary classification shown here and hence no violation of the Constitution. In the absence of constitutional limitations, the question whether a progressive tax is more just and equal than a proportional one is a legislative, not a judicial, question. *Knowlton* v. *Moore,* 178 U. S. 41, 109.

The contention that because the statute is subject to exemptions it is repugnant to the Constitution is also not open, since a similar contention was expressly considered and adversely disposed of in *Knowlton* v. *Moore, Flint* v. *Stone Tracy Co.,* and *Brushaber* v. *Union Pac. R. R., supra,* upon the broad ground that differences in fact between various subjects of taxation will support different treatment in the taxing statutes and presents no question under the Fifth Amendment. This Court has further declared that "when there is a difference it need not be great or conspicuous in order to warrant classification." *Keeney* v. *New York,* 222 U. S. 525, 536.

The decision of this Court in *United States* v. *Goelet,* 232 U. S. 293, makes it clear that there is a difference in fact between resident and nonresident

citizens, and the difference is so substantial that this Court held a tax levied upon "any citizen" can not be treated, without the expression of a more definite intent, as embracing the exceptional exertion of the power to tax one permanently residing abroad.

This Court has declared that objections to a tax because of the exemptions made therein are, in substance and effect, but an assertion that the tax is void because of want of intrinsic uniformity—an assertion which has been adversely disposed of in repeated decisions. *Billings* v. *United States,* 232 U. S. 261, 283–284.

The exemption of individual gifts which do not exceed $500 is said to be an arbitrary discrimination. This contention is likewise without merit since it must be obvious that the amount of tax to be realized from such transfers would be disproportionate to the cost of collection. The District Court took this view and held the fixing of a minimum valuation was reasonable.

We submit that neither the graduated rates nor the statutory exemptions render the tax invalid.

CONCLUSION

The decisions of this Court furnish many precedents justifying the classification of this tax as an excise. No new question is presented by the provisions for graduated rates and reasonable exemptions and it is settled that they do not offend against the Constitution. Accordingly it is submitted that

the answer to both questions certified should be in the negative.

Respectfully submitted.

CHARLES E. HUGHES, Jr.,
Solicitor General.

SEWALL KEY,
J. LOUIS MONARCH,
Special Assistants to the Attorney General.

OCTOBER, 1929.

APPENDIX

Article I of the Constitution provides as follows:

"SECTION. 2. * * *

"Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

* * * * *

"SECTION. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; * * *

"SECTION. 9. * * *

"No Capitation, or other direct, tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

The Fifth Amendment to the Constitution provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for

the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sections 319–324 and 1103 of the Revenue Act of 1924, Act of June 2, 1924, c. 234, 43 Stat. 253, 313–316, 353 (U. S. C., Title 26, Secs. 1131–1136, 1271) provide:

"SEC. 319. For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a nonresident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly: (Here follow the rates of tax.)

"SEC. 320. If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

"SEC. 321. In computing the amount of the gifts subject to the tax imposed by section 319, there shall be allowed as deductions:

"(a) In the case of a resident—

"(1) An exemption of $50,000;

"(2) The amount of all gifts or contributions made within the calendar year to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees, or fraternal society, order, or association, operating under the lodge system, but only if such gifts or contributions are to be used by such trustee or trustees or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year by such corporation, trustee, or fraternal society, order, or association for a religious, charitable, scientific, literary, or educational purpose, or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year to the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act;

"(3) Gifts the aggregate amount of which to any one person does not exceed $500;

"(4) An amount equal to the value of any property transferred by gift within the calendar year, which can be identified (A) as having been received by the donor within five years prior to the time of his making such gift, either from another person by

gift or from a decedent by gift, bequest, devise, or inheritance, or (B) as having been acquired in exchange for property so received. This deduction shall be allowed only where a gift tax or an estate tax under this or any prior act of Congress was paid by or on behalf of the donor or the estate of such decedent, as the case may be, and only in the amount of the value placed by the Commissioner on such property in determining the value of the gift or the gross estate of such decedent, and only to the extent that the value of such property is included in the total amount of gifts made within the calendar year and not deducted under paragraph (2) or (3) of this subdivision.

* * * * *

"SEC. 322. In case a tax has been imposed under section 319 upon any gift, and thereafter upon the death of the donor the amount thereof is required by any provision of Part I of this title to be included in the gross estate of the decedent then there shall be credited against and applied in reduction of the estate tax, which would otherwise be chargeable against the estate of the decedent under the provisions of section 301, an amount equal to the tax paid with respect to such gift; and in the event the donor has in any year paid the tax imposed by section 319 with respect to a gift or gifts which upon the death of the donor must be included in his gross estate and a gift or gifts not required to be so included, then the amount of the tax which shall be deemed to have been paid with respect to the gift or gifts required to be so included shall be that proportion of the entire tax paid on account of all such gifts which the amount of the gift or gifts required to be so included bears to the total amount of gifts in that year.

"SEC. 323. Any person who within the year 1924 or any calendar year thereafter makes any gift or gifts in excess of the deductions allowed by section 321 shall, on or before the 15th day of March, file with the collector a return under oath in duplicate, listing and setting forth therein all gifts and contributions made by him during such calendar year (other than the gifts specified in paragraph (3) of subdivision (a) and in paragraph (2) of subdivision (b) of section 321), and the fair market value thereof when made, and also all sales and exchanges of property owned by him made within such year for less than a fair consideration in money or money's worth, stating therein the fair market value of the property so sold or exchanged and that of the consideration received by him, both as of the date of such sale or exchange.

"SEC. 324. The tax imposed by section 319 shall be paid by the donor on or before the 15th day of March, and shall be assessed, collected, and paid in the same manner and subject, in so far as applicable, to the same provisions of law as the tax imposed by section 301.

* * * * * * *

"SEC. 1103. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby."

By Section 324 of the Revenue Act of February 26, 1926, c. 27, 44 Stat. 9, Section 319 of the Revenue Act of 1924 was amended merely in respect to the rate of the tax with the further provision that that section should take effect as of June 2, 1924.

U. S. GOVERNMENT PRINTING OFFICE: 1929

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 627

JOSEPH H. BROMLEY,

Appellant
(Plaintiff Below)

against

BLAKELY D. McCAUGHN,
Collector of Internal Revenue for the First District of Pennsylvania,

Appellee
(Defendant Below)

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF.

JOHN W. DRYE, JR.,
JOHN M. PERRY,
Office & P. O. Address,
80 Broadway,
Borough of Manhattan,
New York City.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

JOSEPH H. BROMLEY, Appellant, (Plaintiff Below), *against* BLAKELY D. McCAUGHN, Collector of Internal Revenue for the First District of Pennsylvania. Appellee, (Defendant Below).	No. 635.

NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

Sirs:

PLEASE TAKE NOTICE that upon the annexed motion for leave to file a brief as *amici curiae*, the undersigned will move this Honorable Court at the October Term, 1928, thereof, to be held in the Capitol at the City of Washington, District of Columbia, on the 8th day of April, 1929, at the opening of court on that day or as soon thereafter as counsel can be heard for permission to file the annexed brief as *amici curiae* in this case.

Dated, New York, April 1, 1929.

JOHN W. DRYE, JR.,
JOHN M. PERRY,
80 Broadway,
Borough of Manhattan,
New York City.

To:

THE HONORABLE, THE SOLICITOR GENERAL,
OF THE UNITED STATES,
Department of Justice,
Washington, D. C.

IRA JEWELL WILLIAMS, JR.,
IRA JEWELL WILLIAMS,
FRANCIS SHUNK BROWN,
Attorneys for Appellant.

IN THE
SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1928.

JOSEPH H. BROMLEY,
Appellant,
(Plaintiff Below),

against

BLAKELY D. MCCAUGHN,
Collector of Internal Revenue for the First District of Pennsylvania.
Appellee,
(Defendant Below).

No. 635.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The undersigned, as counsel for Abby F. Means, in the case of *Abby F. Means* v. *The United States,* now pending in the Court of Claims of the United States, respectfully move this Honorable Court for leave to file the accompanying brief in this case as *amici curiae.*

There is now pending in the Court of Claims the case of *Means* v. *The United States,* No. H. 366, wherein the undersigned appear as counsel for the claimant. One of the issues raised in that case is the constitutionality of the gift tax provisions of the Revenue Act of 1924. The case was on the February trial calendar of the Court of Claims, but on being advised that the Circuit Court of Appeals for the Third Circuit had asked instructions of this Honorable Court upon the constitutionality of the

gift tax provisions of the Revenue Act of 1924 for its guidance in the case of *Bromley* v. *McCaughn*, the Court of Claims passed the Means case, pending the decision of this Honorable Court on the questions certified.

Counsel in the above-entitled case have consented to the filing of the accompanying brief.

WHEREFORE, motion is respectfully made for permission to file the accompanying brief.

JOHN W. DAVIS, JR.,
JOHN M. PERRY,
Attorneys for Abby F. Means.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

JOSEPH H. BROMLEY, Appellant, (Plaintiff Below), *against* BLAKELY D. McCAUGHN, Collector of Internal Revenue for the First District of Pennsylvania. Appellee, (Defendant Below).	No. 635.

BRIEF AS AMICI CURIAE.

The discussion in this brief will be limited to the proposition that the Federal Gift Tax is a direct tax and, not being apportioned, is unconstitutional.

PROVISIONS OF THE CONSTITUTION AND THE STATUTES INVOLVED.

The Constitution, Article I, Section 2, Clause 3, provides:

> "Representatives and direct taxes shall be apportioned among the several States * * * according to their respective numbers."

Clause 9, subdivision 4, of the same Article, is as follows:

> "No capitation, or other direct taxes, shall be laid, unless in proportion to the Census or enumeration hereinbefore directed to be taken."

The pertinent provisions of Title III, Part II, of the Revenue Act of 1924 purporting to impose the Gift Tax, are as follows:

> "*Sec. 319.* For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly * * *.
>
> *Sec. 320.* If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. Where property is sold or exchanged for less than a fair consideration in money or moneys worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purposes of the tax imposed by Section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year."

ARGUMENT.

The Gift Tax Law (Title III, Part II of the Revenue Act of 1924) was enacted by Congress in May, 1924, and was approved by the President on June 2, 1924. It purported to impose a tax theretofore unknown to our field of taxation. It was, as President Coolidge said at the time of signing the Act, "a further invasion of the rights of the citizen, both unusual in nature and of doubtful legality."

This Court declared unconstitutional the provisions of the Act making it applicable to gifts made prior to June 2, 1924, the date the Act was approved. *Blodgett* v. *Holden*, 275 U. S. 142, *McNeir* v. *Anderson*, 275 U. S. 577, *Untermyer* v. *Anderson*, 276 U. S. 440.

As to gifts made after the date the Act was approved, it is submitted that the tax is a direct tax and

void because not apportioned as required by Article I, Section 2, Clause 3, and by Article I, Section 2, Clause 4 of the Constitution.

The framers of the Constitution deemed the apportionment of direct taxes so important that it was "enforced by two provisions, one affirmative and one negative." The affirmative provision (Article I, Section 2, Clause 3) requires that:

> "Representatives and direct taxes shall be apportioned among the several States * * *"

The negative provision (Article I, Section 9, Clause 4) reads:

> "No capitation, or other direct tax shall be laid, unless in Proportion to the Census or Enumeration hereinbefore directed to be taken."

The Gift Tax was not apportioned and, if a direct tax, was in violation of these Constitutional limitations upon the power of Congress to tax.

(1)

A tax on property because of ownership is a direct tax.

This principle of law is well established.

In *Eisner* v. *Macomber*, 252 U. S. 189, this Court said in considering the tax on stock dividends (page 217):

> "That Congress has power to tax shareholders upon their property interests in the stock of corporations is beyond question; and that such interests might be valued in view of the condition of the Company including its accumulated and undivided profits is equally clear. But that this would be *taxation of property because of ownership*, and hence would require apportionment under the pro-

visions of the Constitution, is settled beyond peradventure by previous decisions of this Court."

Again, in *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, the Court stated at page 294:

> "To levy a tax by reason of ownership of the property is to tax the property."

(2)

The right to dispose of property by gift is an essential attribute or element of the ownership of property.

The right of disposal by gift is inherent in the ownership of property. The Court said in *Buchanan* v. *Warley*, 245 U. S. 60, at p. 74:

> "* * * Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and *dispose of it.* The Constitution protects these essential attributes of property." (Italics ours)

The definitions of property are reviewed and the fundamental law is clearly stated in *Wynehames* v. *The People*, 13 N. Y. 378, 396:

> "Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment. Thus Blackstone says (1 Com., 138): 'The third absolute right of every Englishman is that of property, which consists in the free use, enjoyment and *disposal* of all his acquisitions, without any control or diminution, save only by the laws of the land.' Chancellor Kent says (2 Com., 320): 'The exclusive right of using and *transferring* property follows as a natural consequence from the perception and admission of the right itself.' And again (p. 326): 'The power of *alienation of property* is a necessary incident to the right, and was dictated by mutual convenience

and mutual wants.' By another author, property is defined as an 'exclusive right to things, containing not only a right to use those things, but a *right to dispose of them*, either by exchanging them for other things, *or giving them away to any other person without consideration*, or even throwing them away.' * * * These definitions are in accordance with the general sense of mankind. Indeed, if any one can define property eliminated of its attributes, incapable of sale, and placed without the protection of law, it were well that the attempt should be made." (Italics ours)

There can be no question but that the right of gift is an essential right of property. It is as much a right or incident of property as the right to sell. Yet property would be largely stripped of its value if the right of sale were taken away. The universally recognized right to dispose of property by gift stands in no different category. Value cannot always be measured in money. One man may find satisfaction in hoarding his money and property in miserly fashion; another may choose to use his resources for continual barter and sale; a third may find true compensation and full value in the pleasure and satisfaction of giving his property away. Certainly the right of gift is inseparable from ownership—as inseparable as the right to enjoy the rents and profits, to have possession or to sell.

(3)

A tax on an essential element of the ownership of property is a direct tax.

The whole always includes all of the parts. It follows logically that a tax on one of the essential elements of ownership is a tax upon the ownership of the property. To state the proposition is to prove it.

In *Pollock* v. *The Farmers Loan and Trust Company*, 157 U. S. 429, 158 U. S. 601, a tax upon an element of property, namely, the income therefrom, was held to be a direct tax. Chief Justice Fuller in his concurring opinion referred to indirect taxes and then concluded (157 U. S. 558):

> "* * * but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes."

And again at page 591 the Chief Justice stated the principle as follows:

> "It must be conceded that whatever affects *any element* that gives an article its value in the eye of the law affects the property itself." (Italics ours).

A tax upon the right to the possession of property was held to be a direct tax in *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288; that is, that a tax on the right to take liquor from a bonded warehouse where it was required to be placed, was a direct tax. The right to possession is, as the right of disposal by gift, but one of the many essential elements of ownership.

This Court quoted with approval from the decision of the lower Court (page 294):

> "The thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, i.e., consumption, sale or keeping for future consumption or sale. * * * The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value."

Thompson v. *McLeod*, 112 Miss. 383, 73 So. 193, was cited with approval in the Kentucky Distilleries Case. The Mississippi Court held that a tax upon the extraction of turpentine from trees in the state was a property tax, pointing out in the course of its opinion (page 388) that:

> "This act strikes down the inherent right of the property owner to lay hand upon his own property. Every owner of a pine-tree enjoys the same natural right to extract gum from the tree, as the owner of a vineyard has to pluck his own grapes. It would be the same thing to require a privilege tax as a precedent right of the owner to pull the ripe pecans from his pecan orchard or to enjoy a drink of pure water from the cool spring of the old homestead."

And we might add that it would be the same thing to require a privilege tax as a precedent right to give the grapes or pecans to his children or his spouse or to a hungry wayfarer who might pass his way.

In *Nicol* v. *Ames*, 173 U. S. 509, this Court held a tax upon the privilege of doing business at "exchanges", an indirect tax but Mr. Justice Peckham pointed out the distinction between the tax under consideration and tax on sales in general. The following is quoted from the opinion at page 521:

> "A tax on the privilege of selling property at the exchange and of using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded."

These cases clearly show the error of the conclusion of the learned Circuit Court of Appeals in *O'Connor* v. *Anderson*, 16 Fed. (2nd) 970, 973, that the Gift Tax law may be sustained as an indirect tax because—

> "It cannot be successfully contended that the right to give away property exhausts those interests which together constitute the rights of property. * * *"

It is submitted that there is no material difference between a tax upon the gift of property and a tax upon the income of property or a tax upon the right to possession of property or a tax on the general right of sale.

(4)

The Gift Tax may not be justified as an excise tax.

No definition of excise taxes has been found that includes the private transfer of property by gift; no definition has been uncovered that could be extended by implication or analogy to embrace such transactions.

In *Patton* v. *Brady*, 184 U. S. 608, 617, this Court reviewed the definitions as follows:

> "Turning to Blackstone, vol. 1, p. 318, we find an excise defined: 'An inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption.' This definition is accepted by Story in his Constitution of the United States, sec. 953. Cooley in his work on Taxation, page 3, defines it as 'an inland impost levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades, or to deal in certain commodities.' Bouvier and Black, respectively, in their dictionaries, give the same definition. If we turn to the general dictionaries, Webster's International calls it 'an inland duty or impost operating as an indirect tax on the consumer, levied upon certain specified articles, as tobacco, ale, spirits, etc., grown or manufactured in the country. It is also levied on licenses to pursue certain trades and deal in certain commodities.' The definition in the Century Dictionary is substantially the same, though in addition this is quoted from Andrews on Rev. Law, sec. 133: 'Excises is a

> word generally used in contradistinction to imposts in its restricted sense, and is applied to internal or inland impositions, levied sometimes upon the consumption of a commodity, sometimes upon the retail sale of it, and sometimes upon the manufacture of it."

In *Thomas* v. *U. S.*, 192 U. S. 363, 370, Chief Justice Fuller, speaking for the Court, said:

> "There is no occasion to attempt to confine the words duties, imposts and excises to the limits of precise definition. We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like."

All of these classes of excise taxes have a historical background. They were imposed as excises in England from whom we took our forms of taxation. While it may not be true that a tax must have been known as an excise tax at the time of the adoption of the constitution to receive that classification, its general character should be determined with reference to the known occasions of taxation falling into the two groups of direct and indirect taxes.

The gift tax has the attributes of a direct tax. A gift is an unilateral act. It is the exercise of an inherent right and not a privilege created by any special arrangement or act of sovereignty. The exercise of the right to give cannot affect or involve society detrimentally. The subject of the gift is *property* and not the special use or consumption thereof; the tax is on the donor and irrespective of whether the property is used or consumed by the donee.

What other inherent right relating to the "res" itself and not the consumption or special use thereof has, when exercised, been held to be a subject for the levy of an excise? In other words, an excise (which is a cutting out) is available only when predicated upon that which is

available by reason of a privilege created by special arrangement or act of sovereignty, or on account of use or consumption, or because of being affected with a public interest.

Inheritance, estate and succession taxes have been sustained on the theory that historically no man has the natural right to pass property by will or inheritance without the consent of the sovereign, and that the privilege exercised with the consent of the sovereign is subject to an excise tax. *U. S.* v. *Perkins*, 163 U. S. 625; *Knowlton* v. *Moore*, 178 U. S. 41; *New York Trust* v. *Eisner*, 256 U. S. 345.

Some of the special privileges incidental to business that have been made the subject of the excise tax are:

(1) On the privilege of selling tobacco, a consumable article: *Patton* v. *Brady*, 184 U. S. 608.

(2) On the privilege of doing business at "exchanges": *Nichol* v. *Ames*, 173 U. S. 509.

(3) On the privilege of disposing of property in the form of certificates of Stock under the corporation law: *Thomas* v. *U. S.*, 192 U. S. 363.

(4) On the privilege of carrying on of business in corporate form: *Flint* v. *Stone Tracy Co.*, 220 U. S. 107.

The distinction between these taxes and a tax on the right to give is obvious. The right to regulate business is wholly different from the right to tax the exercise of the ordinary and indispensable right to dispose of property by gift.

The tax in *Hylton* v. *United States*, 3 Dall. 171, upon which the appellee relies, was not a tax on the carriages but on expense or exhaustion through use thereof.

Mr. J. Chase said (p. 175): "It seems to me that a tax on expense is an indirect tax; and I think an annual tax on a carriage for the conveyance of persons, is of that kind; because a carriage is a consumable com-

modity, and such annual tax on it, is on the expense of the owner."

A tax on a foreign built yacht not actually used at all during the preceding years was not sustained. *Pierce* v. *United States*, 232 U. S. 290.

We have pointed out above that the Gift Tax is a tax on one of the essential elements or attributes of property which inheres in the ownership of property and that such a tax has been held to be a direct tax. It follows that the tax may not be justified by calling it a tax on a "transfer" or a tax arising by the event of gift or by attaching any other label associated with indirect taxes. Such artificial distinctions have no place in the field of practical taxation.

In *Dawson* v. *Kentucky Distilleries Co., supra*, this Court said (page 292):

> "The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents."

In the *Pollock* case, this Court had pointed out in considering certain refinements of the argument:

> "But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this Court."

And in its decision in *Kansas City Ry. Co.* v. *Botkin*, 240 U. S. 227, this Court said (page 235):

> "Undoubtedly, a tax may be in form a privilege tax, and, yet, in substance, may be a tax on property."

Furthermore, the Gift Tax may not be sustained as an aid to the enforcement of the Estate Tax Law.

A Wisconsin statute, imposing an estate tax upon gifts made in contemplation of death, provided that the presumption was conclusive that any gift made within

six years prior to death was so made. It was argued that this presumption was necessary to prevent evasion of the Estate Tax. This Court rejected the argument and held the Act unconstitutional. *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 240.

In the recent case of *Nichols* v. *Coolidge*, 274 U. S. 531, Mr. Justice McReynolds said at p. 541:

> "But under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them."

To summarize, as Judge Augustus M. Hand said in his opinion in *McNeir* v. *Anderson*, 10 Fed. (2nd) 813, 814:

> "If there is anything left of the general views of the Court in Pollack *v.* Farmers Loan & Trust Co., 158 U. S. 601, as to the nature of so-called direct taxes, a tax upon a gift not made in contemplation of death and not to take effect upon death would seem to be necessarily a direct tax imposed upon the donor purely as the owner of property."

CONCLUSION.

In conclusion, it is respectively submitted that the provisions of Title III, Part II, of the Revenue Act of 1924, are unconstitutional.

JOHN W. DRYE, JR.,
JOHN M. PERRY,
Amici Curiae.

SUPREME COURT OF THE UNITED STATES.

No. 27.—October Term, 1929.

Joseph H. Bromley, *vs.* Blakely D. McCaughn, Collector of Internal Revenue for the First District of Pennsylvania.	On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

[November 25, 1929.]

Mr. Justice Stone delivered the opinion of the Court.

In this case, pending in the Court of Appeals for the Third Circuit, that court has certified to this questions of law concerning which it asks instructions for the proper disposition of the cause. Judicial Code, § 239, as amended by Act of February 13, 1925.

Bromley, a resident of the United States, brought the present suit in the District Court for Eastern Pennsylvania, to recover a tax alleged to have been illegally exacted, upon gifts made by him after the effective date of § 319(a) of the Revenue Act of 1924 (43 Stat. 253, 313, as amended by § 324(a) of the Revenue Act of 1926, 44 Stat. 9, 26). This section imposes a graduated tax "upon the transfer by a resident by gift" during the calendar year "of any property wherever situated . . ." In computing the amount of the gift subject to the tax, § 321, in the case of a resident, exempts gifts aggregating $50,000, gifts to any one person which do not exceed $500, and certain gifts for religious, charitable, educational, scientific and like purposes. The questions certified are:

1. Are the provisions of Sections 319-324 of the Revenue Act of 1924, as amended by Section 324 of the Revenue Act of 1926, when applied to transfers of property by gift inter vivos, made after the effective dates of the cited Revenue Acts and not made in contemplation of death, invalid, because they violate (a) the third clause of Section 2 and (b) the fourth clause of Section 9 of Article 1 of the Constitution in that the tax they impose is a direct tax and has not been apportioned?

2. Are the cited provisions, when applied to transfers of property made in like circumstances, invalid because they violate (a) the Fifth Amendment to the Constitution and (b) the first clause of Section 8 of Article 1 of the Constitution in that they impose a tax which is graduated and subject to exemptions and therefore lacks uniformity, and also deprive a person of his property without due process of law?

1. The first question was mooted by counsel, but not decided in *Blodgett* v. *Holden,* 275 U. S. 142, and *Untermyer* v. *Anderson,* 276 U. S. 440. The general power to "lay and collect taxes, duties, imposts and excises" conferred by Article I, § 8 of the Constitution, and required by that section to be uniform throughout the United States, is limited by § 2 of the same article, which requires "direct" taxes to be apportioned, and § 9, which provides that "no capitation or other direct tax shall be laid unless in proportion to the census" directed by the Constitution to be taken. As the present tax is not apportioned, it is forbidden if direct.

The meaning of the phrase "direct taxes" and the historical background of the constitutional requirement for their apportionment have been so often and exhaustively considered by this Court, *Hylton* v. *United States,* 3 Dall. 171; *Pollock* v. *Farmers Loan & Trust Company,* 157 U. S. 429, 158 U. S. 601; *Knowlton* v. *Moore,* 178 U. S. 41; *Nicol* v. *Ames,* 173 U. S. 509, 515, that no useful purpose would be served by renewing the discussion here. Whatever may be the precise line which sets off direct taxes from others, we need not now determine. While taxes levied upon or collected from persons because of their general ownership of property may be taken to be direct, *Pollock* v. *Farmers Loan & Trust Company,* 157 U. S. 429, 158 U. S. 601, this Court has consistently held, almost from the foundation of the government, that a tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership, is an excise which need not be apportioned, and it is enough for present purposes that this tax is of the latter class. *Hylton* v. *United States, supra,* cf. *Veazie Bank* v. *Fenno,* 8 Wall. 533; *Thomas* v. *United States,* 192 U. S. 363, 370; *Billings* v. *United States,* 232 U. S. 261; *Nicol* v. *Ames, supra; Patton* v. *Brady,* 184 U. S. 608; *McCray* v. *United States,* 195 U. S. 27; *Scholey* v. *Rew,* 23 Wall. 331; *Knowlton* v. *Moore, supra;* see also *Flint* v. *Stone-Tracy Co.,* 220 U. S. 107; *Spreckels Sugar Refining Co.* v. *McClain,* 192 U. S. 397; *Stratton's Independence* v. *Howbert,* 231 U. S. 399; *Doyle* v. *Mitchell Brothers Co.,* 247 U. S. 179, 183; *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103, 114.

It is a tax laid only upon the exercise of a single one of those powers incident to ownership, the power to give the property owned to another. Under this statute all the other rights and powers which collectively constitute property or ownership may

be fully enjoyed free of the tax. So far as the constitutional power to tax is concerned, it would be difficult to state any intelligible distinction, founded either in reason or upon practical considerations of weight, between a tax upon the exercise of the power to give property *inter vivos* and the disposition of it by legacy, upheld in *Knowlton* v. *Moore, supra,* the succession tax in *Scholey* v. *Rew, supra,* the tax upon the manufacture and sale of colored oleomargarine in *McCray* v. *United States, supra,* the tax upon sales of grain upon an exchange in *Nicol* v. *Ames, supra,* the tax upon sales of shares of stock in *Thomas* v. *United States, supra,* the tax upon the use of foreign built yachts in *Billings* v. *United States, supra,* the tax upon the use of carriages in *Hylton* v. *United States, supra;* compare *Veazie Bank* v. *Fenno, supra,* 545, *Thomas* v. *United States, supra,* 370.

It is true that in each of these cases the tax was imposed upon the exercise of one of the numerous rights of property, but each is clearly distinguishable from a tax which falls upon the owner merely because he is owner, regardless of the use or disposition made of his property. See *Billings* v. *United States, supra;* cf. *Pierce* v. *United States,* 232 U. S. 290. The persistence of this distinction and the justification for it rest upon the historic fact that taxes of this type were not understood to be direct taxes when the Constitution was adopted and, as well, upon the reluctance of this Court to enlarge by construction, limitations upon the sovereign power of taxation by Article I, § 8, so vital to the maintenance of the National Government. *Nicol* v. *Ames, supra,* 514, 515.

It is said that since property is the sum of all the rights and powers incident to ownership, if an unapportioned tax on the exercise of any of them is upheld, the distinction between direct and other classes of taxes may be wiped out, since the property itself may likewise be taxed by resort to the expedient of levying numerous taxes upon its uses; that one of the uses of property is to keep it, and that a tax upon the possession or keeping of property is no different from a tax on the property itself. Even if we assume that a tax levied upon all the uses to which property may be put, or upon the exercise of a single power indispensable to the enjoyment of all others over it, would be in effect a tax upon property, see *Dawson* v. *Kentucky Distilling & Warehouse Co.,* 255 U. S. 288, and hence a direct tax requiring apportionment, that is not the case before us.

The power to give cannot be said to be a more important incident of property than the power to use, the exercise of which was taxed in *Billings* v. *United States,* and even though differences in degree may be carried to a point where they produce distinctions in kind, the present levy falls so far short of taxing generally the uses of property that it cannot be likened to the taxes on property itself which have been recognized as direct. It falls, rather, into that category of imposts or excises which, since they apply only to a limited exercise of property rights, have been deemed to be indirect and so valid although not apportioned.

2. The uniformity of taxation throughout the United States enjoined by Article I, § 8, is geographic, not intrinsic. A graduated tax, on legacies, granting exemptions, *Knowlton* v. *Moore, supra,* or on incomes, *Brushaber* v. *Union Pacific R. R.,* 240 U. S. 1, does not violate this clause of the Constitution, nor are such taxes infringements on the Fifth Amendment. *Knowlton* v. *Moore, supra,* p. 109; *Brushaber* v. *Union Pacific R. R., supra,* pp. 24, 25. Graduated taxes on inheritances or successions, with provisions for exemptions, have so often been upheld as not violating either the due process or the equal protection clauses of the Fourteenth Amendment, *Stebbins* v. *Riley,* 268 U. S. 137, as to leave little ground for supposing that taxation by Congress embracing these features, and otherwise valid, could be deemed a denial of the due process clause of the Fifth. See *Van Oster* v. *Kansas,* 272 U. S. 465, 468.

It is suggested that the schemes of graduation and exemption in the present statute, by which the tax levied upon donors of the same total amounts may be affected by the size of the gifts to individual donees, are so arbitrary and unreasonable as to deprive the taxpayer of property without due process. But similar features of state death taxes have been held not to infringe the Fourteenth Amendment since they bear such a relation to the subject of the tax as not "to preclude the assumption that the legislature, in enacting the statute, did not act arbitrarily or without the exercise of judgment and discretion which rightfully belong to it." *Stebbins* v. *Riley, supra,* p. 145. No more can they be a basis for holding that the graduation and exemption features of the present statute violate the Fifth Amendment.

The answer to both questions is, No.

SUPREME COURT OF THE UNITED STATES.

No. 27.—October Term, 1929.

Joseph H. Bromley,
vs.
Blakely D. McCaughn, Collector of Internal Revenue for the First District of Pennsylvania.

On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

[November 25, 1929.]

Mr. Justice Sutherland, dissenting.

In the convention which framed the Constitution, Mr. King on one occasion asked what was the precise meaning of "direct taxation," and Mr. Madison informs us that no one answered. That Mr. Madison took the pains to record the incident indicates that it challenged attention but that no one was able to formulate a definition. And though we understand generally what is a direct tax and what taxes have been declared to be direct, we are still as incapable of formulating an exact definition as were those who wrote the taxation clauses into the Constitution. Since the *Pollock* case, however, we know that a tax on property, whether real or personal, or upon the income derived therefrom, is direct; and that to levy a tax by reason of ownership of property is to tax the property. *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, 294.

The right to give away one's property is as fundamental as the right to sell it or, indeed, to possess it. To give away property is not to exercise a separate element or incident of ownership, like the use of a carriage, but completely to sever the donor's relation to the property and leave in him no element or incident of ownership whatsoever. Reasonably it cannot be doubted that the power to dispose of property according to the will of the owner is a property right. If a tax upon the sale of property, irrespective of special circumstances, is a direct tax, it is clear that a tax upon the gift of property, irrespective of special circumstances, is, likewise, direct. In my opinion, both are direct because they are in sub-

stance and effect not excise taxes but taxes upon property. By repeated decisions of this Court it has become axiomatic that it is the substance and not the form that controls in such matters.

Brown v. *Maryland,* 12 Wh. 419, involved the validity of a state statute which exacted a license fee of $50 of importers of foreign goods and other persons selling the same by wholesale, bale or package, etc. The act was held void as imposing a duty on imports. It was argued that the tax was not upon the article but upon the person; that the state had the power to tax occupations, and this was nothing more. To this Chief Justice Marshall replied (p. 444) in words that have been repeatedly approved in subsequent decisions of this Court:

"It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

In *Cook* v. *Pennsylvania,* 97 U. S. 566, it was held that a tax on the amount of sales made by an auctioneer was a tax upon the goods sold, and where these goods were imported in the original package and sold for the importer the law authorizing the tax was void.

Nicol v. *Ames.* 173 U. S. 509, is not to the contrary of these cases, but in complete accord with them. There it was held that a tax levied upon a sale of property effected at a board of trade or exchange was an excise laid upon the privilege, opportunity or facility afforded by boards of trade or exchanges for the transaction of the business and not upon the property *or the sale thereof,* which, it was conceded, would be a direct tax and void without apportionment. Brief quotations from the opinion will make the distinction clear. Referring to the cases which had been cited against the tax, including *Brown* v. *Maryland, supra,* and the *Pollock* case, it was said that all these cases involved the question whether the taxes assailed were in effect taxes upon property and (p. 519): "If this tax is not on the property *or on the sale thereof,* then these cases do not apply." At p. 520, answering the contention that the tax was one on the property sold, it was said: "It is not laid upon the property at all, nor upon the profits of the sale thereof, nor upon the sale itself considered separate and

apart from the place and the circumstances of the sale." And finally, at p. 521, the Court said in words that admit of no mistake: "A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. *The latter tax is really and practically upon property.* It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded."

To me it seems plain that a tax imposed upon an ordinary gift, to be measured by the value of the property given and without regard to any qualifying circumstances, is a tax by indirection upon the property, as much, for example, as a tax upon the mere possession by the owner of a farm, measured by the value of the land possessed, would be a tax on the land. To call either of them an excise is to sacrifice substance to a mere form of words. I think, therefore, the first question certified, without stopping to consider the second, should be answered in the affirmative.

Mr. Justice VAN DEVANTER and Mr. Justice BUTLER concur in this opinion.